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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1239

FIFTH STREET BUILDING, A CORPORATION,
Appellant,

vs.

CHARLES J. McCOLGAN, AS FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION, AND STATEMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

May it Please the Court:

The California State Franchise Tax Commissioner moves the Court to dismiss this appeal or to affirm the judgment below for the following reason:

1. There is no substantial Federal question presented as a basis of jurisdiction in this Court, because the questions presented, relating to the constitutional power of Congress to prescribe duties and obligations of trustees in bank-

ruptcy, have been so thoroughly foreclosed by previous decisions of this Court and other Federal courts as to leave no debatable ground for attacking the decision of the Supreme Court of California, and therefore the questions presented are unsubstantial.

Wherefore, the California State Franchise Tax Commissioner moves the Court to dismiss the appeal in this cause for lack of a substantial Federal question or, in the alternative, to affirm the judgment of the Supreme Court of California from which this appeal was taken, for the reason that the questions presented are foreclosed by prior decisions of this Court.

Argument in Support of Motion.

Statement of the Case.

This cause involves the constitutionality of the California Bank and Corporation Franchise Tax Act in so far as it has been construed to impose a tax on a trustee in bankruptcy who carries on the business of a bankrupt corporation. An Act of Congress (48 Stats. 993, 28 U. S. C. A. Sec. 124a) authorizes such taxation and that provision as applied by the California Supreme Court is challenged by appellant as violative of two provisions of the Federal Constitution because its effect is to impose a State tax.

The facts of the case are, briefly restated, that a California corporation became bankrupt in 1934 and a trustee was appointed by a proper Federal court. This trustee, during the calendar year 1937, carried on the business of the bankrupt corporation and paid a State franchise tax for 1937 measured by the net income of the preceding year. It is also a fact that in 1936 the bankrupt corporation was discharged and thereafter exercised its franchise in some undisclosed manner and degree, but as the tax herein involved was not measured in any part by any income derived

by the discharged corporation from the use of that franchise, the fact is believed to be without significance.

The ground on which 28 U. S. C. Sec. 124a and the California Act are attacked is without substance.

Sec. 124a of Title 28, United States Code, reads in so far as pertinent as follows:

> "Any receiver, liquidator, referee, trustee, or other officer or agent appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

It is clear that the effect of this statute is not to impose a State tax but to withdraw restrictions theretofore thought to have been placed by the Bankruptcy Act on State power to tax.

Prior to the enactment of section 124a, the decisions had concluded that a trustee in bankruptcy was not subject to State franchise taxes to which the bankrupt corporation had been subject. This conclusion was based on a determination that the trustee was separate and apart from the corporation and was not a continuation of the corporation. The latter determination was commonly expressed in such statements as "the trustee takes title to the property in his own name" and "the trustee does not operate under the franchise of the corporation but in his own right." These statements were not based on constitutional provisions but were based on implications drawn from the enactments of Congress, including the Bankruptcy Act. We believe it obvious that Congress could withdraw these implications and could make the trustee operate under the franchise and in the name of the bankrupt corporation. We believe it also obvious that if the power of the States

to tax the trustee should be thought to be inhibited by a possible conflict with the Federal bankruptcy power, Congress could declare that the payment of State taxes would not impede the exercise of the bankruptcy power, and thereby remove the limitation on State taxation.

Had Congress expressed itself in the manner suggested in the preceding paragraph, any contention that such enactments were unconstitutional because they imposed State taxes and interfered with the reserve power of the States would have been frivolous, since the sole effect of the enactments would have been to remove implied limitations on the powers of the States. Yet the effect of section 124a is precisely the same: the section merely removes a bar theretofore thought to have been placed by Congress itself on the exercise by the States of their reserved powers.

The constitutionality of section 124a is also shown by *Gillis* v. *Calif.*, 293 U. S. 62, suggesting a different approach to the instant problem. There this Court upheld section 124, Title 28, United States Code (the companion section to section 124a) against comparable attacks, pointing out that Congress had power to restrict the powers of the United States District Courts and to deny them the authority to empower appointees to function in disregard of State laws. Thus Congress can withdraw from its bankruptcy courts power to appoint trustees with capacity and authority to function with immunity from those State tax laws which would have reached the bankrupt.

This Court has twice considered section 124a, once in *Boteler* v. *Ingels*, 308 U. S. 57, and once in the companion cases of *Palmer* v. *Webster & Atlas Nat. Bk.*, 312 U. S. 156, and *Philadelphia Co.* v. *Dipple*, 312 U. S. 168. The former case held that the section compelled a recalcitrant trustee to pay a penalty because he failed to pay State automobile taxes when due, a result not consistent with

the theory that the section is unconstitutional. In the *Palmer* case, involving a State franchise tax, although this Court held that the particular tax was not encompassed by the section since it was not the insolvent's tax, this Court stated that:

> "What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise."

Certainly this statement cannot be reconciled with appellant's theory.

The precise problem herein presented, including the contention that the section, as construed by the court below, is unconstitutional, was met and disposed of in *Thompson* v. *Louisiana* (C. C. A. 8) 98 Fed. (2d) 108. That decision upheld the validity of the section as applied to a trustee in a section 77 (section 205, Title 11, U. S. Code) proceeding. As section 205 (c) (2) provides in part that "The trustee or trustees * * * shall have all the title and shall exercise * * * all the powers of a trustee appointed pursuant to section 72," and as trustees in bankruptcy are appointed pursuant to section 72, that decision may be seen to be direct authority supporting the decision in this case.

Appellant also argues that the California Bank and Corporation Franchise Tax Act as construed by the California Supreme Court is unconstitutional because it invades the reserved powers of the States and because it imposes a Federal tax for the benefit of California. Undoubtedly appellant made this argument inadvertently, as it is erroneous on its face.

Statement in Opposition to Granting Writ of Certiorari.

May it Please the Court:

The California State Franchise Tax Commissioner hereby opposes the Court's granting a writ of certiorari if the Court treat the appeal as a petition for a writ under section 344 (c) of Title 28, United States Code. The grounds for this opposition are:

1. The decision below is in accord with the only other decision on the subject, thus there is no conflict of decision;

2. The decision below is consistent with the decisions and the reasons in support thereof of this Court, thus the decision of the California Supreme Court is correct and will not give rise to uncertainty.

Argument.

On parges 10 and 11 of the typewritten Statement in Support of Jurisdiction, appellant challenges the decision below as being in conflict with the proper interpretation of section 124a. As this is merely another way of saying that appellant urges that the court below has placed an erroneous construction on section 124a, this contention seems to be one not properly within the scope of section 344 (a) of Title 28, but properly within the scope of section 344 (b) of that title, dealing with certiorari. If this be correct, this Court will, under section 344 (c), treat the appeal herein as a petition for writ of certiorari. However, no good reason exists for issuing a writ herein. In addition to being a correct decision, the decision of the California Supreme Court reaches the same conclusion as that of the Eighth Circuit Court of Appeals in *Thompson* v. *Louisiana, supra.* Furthermore, the decision is sug-

gested by *Boteler* v. *Ingels, supra,* and applies section 124a in a manner consistent with its scope and purpose as outlined by this Court in *Palmer* v. *Webster & Atlas Nat. Bk., supra.* Thus a decision by this Court is not necessary either to remove uncertainty as to the correct construction of section 124a or to cure a lack of uniformity of decision.

Respectfully submitted,

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